

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 174114
Issued to: Richard G. Fifer, II

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2338

Richard G. Fifer, II

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 8 March 1983, and Administrative Law Judge of the United States Coast Guard at Miami, Florida revoked Appellant's mariner's license upon finding proved the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that on or about 1 March 1982, Appellant was convicted of possession of cannabis (over 100 pounds) by the Circuit Court, Seventeenth Judicial Circuit, in and for Broward County, Florida.

The hearing was held at Miami, Florida on 9 December 1982 and on 20 January 1983.

At the hearing, Appellant was represented by professional counsel and entered a plea of guilty to the charge and specification.

The Investigating Officer introduced in evidence six exhibits. At the end of the hearing on 9 December 1982 the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved by plea. The hearing was then continued to 20 January 1983. On that day Appellant testified, called three witnesses and introduced into evidence two exhibits all directed toward mitigation and extenuation.

The Administrative Law Judge's decision and order revoking all licenses and documents issued to Appellant, dated 8 March 1983, was served on 14 March 1983. Appeal was timely filed on 17 March 1983 and perfected on 4 May 1983.

FINDINGS OF FACT

At about 0700 on 17 March 1978 Appellant and a companion were aboard the forty-five foot vessel COMMANDO II which was entering Port Everglades, Florida. The COMMANDO II was boarded by three Coast Guard Petty Officers who conducted a routine safety inspection. One of the boarding officers noticed numerous bales

below deck and recognized the odor of marijuana. The vessel was seized and a total of 4900 pounds of marijuana was confiscated.

At his first trial in 1978 Appellant successfully sought to suppress the seized marijuana. The State successfully appealed to the Florida District Court of Appeal for the Fourth Circuit and the case was remanded for trial. Both the Florida Supreme Court and the Supreme Court of the United States refused to review the case. On 1 March 1982 Appellant was convicted of possession of cannabis in excess of 100 pounds by the Circuit Court in Broward County, Florida, following his plea of guilty. He was sentenced to five years probation, 364 days in the Broward County Stockade and to a fine of \$10,000.00. After serving four and one-half months in the stockade, Appellant's sentence was mitigated and he was released.

Appellant testified before the Administrative Law Judge that he had become involved in the drug operation after being approached several times. He accepted the offer because he had a "lot of financial responsibilities" and "wanted to provide a little more for [his] family." His decision "did not seem like such a difficult or wrong thing at the time...." Appellant now feels that decision was a mistake.

Appellant has worked on charter fishing boats and as a delivery captain since his honorable discharge from the Navy several years ago. In 1978 he was offered a job by his current employer. Appellant advised his employer that he had been arrested for possessing marijuana. He was hired nonetheless and has continued with that employer except for the period of his imprisonment in 1982. At the time the charges were filed, Appellant was supervising the construction of a charter fishing boat. He was to serve as Operator on the boat upon its delivery.

Appellant is also occasionally employed to deliver boats for buyers or yacht brokers to various destinations. One broker who frequently employs Appellant testified that Appellant is "second to none" as an operator. That broker also stated that Appellant informed him of his arrest and pending trial when he was first employed. The broker kept a close watch on Appellant and was extremely satisfied with both Appellant's character and seamanship.

Appellant testified that a license is required for him to work as a charter boat operator. The yacht broker testified that marine insurers require a licensed operator to deliver vessels.

Appellant was divorced while in the stockade and provides child support for his son. He has actual custody of the child over one-half of the time. He also provides partial support for his ailing father.

At the hearing Appellant offered two exhibits, a letter from his employer, and several letters submitted in support of his application to the Florida Circuit Court for mitigation of his sentence. Appellant testified and called three witnesses who testified as to his character and abilities.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that:

1. The Administrative Law Judge erred in concluding that he lacked authority to render a sanction other than revocation.
2. The sanction of revocation is disproportionate to the offense under the circumstances.

APPEARANCE: Jack M. Ross, Esq., of Birr, Bryant and Saier, P.A., Gainesville, Florida.

OPINION

I

The issue of whether an Administrative Law Judge has authority to render a sanction other than revocation following proof of a conviction for a narcotic drug law violation has been recently discussed in Appeal Decision 2303 (HODGMAN). In Hodgman I concluded that the Administrative Law Judge is properly required to enter an order of revocation following proof of conviction for a narcotic drug offense. I will not repeat that decision here.

II

Appellant urges that revocation is not appropriate in this case. I do not agree. However, I believe that Appellant should be given the opportunity to establish that he may be safely entrusted with a license under the provisions of 46 CFR 5.13 at this time.

Under 46 U.S.C. 239b I have discretion to revoke or not to revoke a license or document following a narcotic drug law conviction. In most cases revocation is appropriate. Where unusual circumstances exist such that revocation is not appropriate, I have vacated the order of the Administrative Law Judge or made provision for an individual to make early application for a new license. See Appeal Decision 2303 (HODGMAN) and cases cited therein.

The Administrative Law Judge has properly spread on the record

the circumstances of Appellant's conviction and evidence related to whether leniency is appropriate. See HODGMAN, supra. Therefore, I can properly exercise my statutory discretion.

Over five years have elapse since Appellant's arrest in 1978. Because of the many appeals in his criminal case, he was not convicted until 1982. Following his arrest, both before and after his conviction, he served under the authority of his license without incident. That period of honorable service is evidence, although not conclusive, of Appellant's rehabilitation.

At the hearing several witnesses testified as to Appellant's character and fitness as a mariner. From the record it appears that Appellant was forthright in disclosing his prior criminal activity to potential employers. Nevertheless those employers hired Appellant, were extremely happy with his work, and recommend him highly.

From the record it appears that Appellant has strong ties to his family and a good reputation in the community. He has taken actual custody of his son for a greater portion of the time than provided for by his divorce decree. When he does not have custody of his son, he provides child support payments. The witnesses at the hearing unhesitatingly testified as to Appellant's good character.

Appellant also introduced several of the letters submitted to the Florida Circuit Court. That material persuaded the Court to mitigate Appellant's sentence and release him from the stockade. Those letters establish his degree of rehabilitation as of 1982.

After receiving all of this evidence the Administrative Law Judge recommended that I act leniently. Such recommendations by the trier of fact are given great weight in exercising my discretion. The fact remains, however, that Appellant was arrested and convicted for smuggling 4900 pounds of marijuana into the United States. This is an especially serious offense. In addition, he was the holder of a license rather than a document. Under these circumstances Appellant must make an especially strong showing that he is rehabilitated before he will be allowed to hold a license. See Appeal Decision 2311 (STRUDWICK).

Appellant has presented much evidence showing that he is rehabilitated; however, he was involved in a serious smuggling incident and a license would provide him the opportunity to again engage in such activity. In this case the evidence in the record, although very favorable to Appellant, does not cover his present activities and associations thoroughly enough to rule out that possibility. Therefore, based on the circumstances of this case,

I will not vacate the revocation of Appellant's license. However, I believe a more thorough examination of Appellant's fitness to hold a license is appropriate. Since Appellant has now demonstrated the extent of his rehabilitation over three years, I will waive the three year waiting period before application for a new license is permitted under 46 CFR 5.13. Should Appellant make such application, a thorough inquiry will be made into his qualifications.

CONCLUSION

Appellant's plea supports the findings of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations. An analysis of the circumstances of this case convinces me that Appellant's license should be revoked. Those facts also convince me that Appellant should be allowed to immediately apply for a new license in accordance with 46 CFR 5.13.

ORDER

The order of the Administrative Law Judge revoking Appellant's mariner's license, dated at Miami, Florida, on 8 March 1983 is AFFIRMED. Appellant may apply for a new license in accordance with 46 CFR 5.13 immediately.

J. S. GRACEY
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 6th day of Jan. 1984.